IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE NO.845 OF 2006
IN
EXECUTION APPLICATION 305 OF 2006
IN
VARODARA SUIT NO.830 OF 1997

Gujarat Alkalies & Chemicals Ltd. ....Plaintiff
V/s.
M/s.Aminex Rasayan & Ors. ....Defendants

Mr.Zubin Behram-Kamdin with Mr.Sarosh Bharucha i/b Amarchand Mangaldas & S.A. Shroff & Co. for the Plaintiff.

Mr.Sanjay Jain i/b A.V. Jain & Associates for Defendant Nos.2 and 4.

Mr.Swapnil Bangur i/b Nisha Malani for Defendant No.3.

Mr.Snehal Shah i/b Nivit Srivastava & Co. for Defendant Nos.7 to 11.

CORAM : S.J. VAZIFDAR, J.
DATED : 20TH DECEMBER, 2007.

P.C. :

1. This is the Plaintiff's application under order XXI Rule 22 of the Code of Civil Procedure, 1908.

2. Defendant Nos.4 and 11 have filed affidavits raising objections. The remaining Defendants have not filed any affidavits. However, objections were raised

on behalf of Defendant Nos.2, 3 and 7 to 10 during the hearing.

3. The execution proceedings are in respect of an order and decree dated 25.6.1999 passed by the Court of Third Joint Civil Judge (S.D.) of Vadodara in Summary Suit No.830 of 1997.

4. The suit was filed in 1997. The consent terms are dated 1.6.1999 and the original decree, as stated above, was passed on 25.6.1999. The Plaintiff states that by 2.6.2003 a sum of Rs.56,00,000/- was paid and has given credit for the same. The execution proceedings have been adopted in respect of the balance which is in the sum of over Rs.6,50,00,000/-. The notice was issued on 6.7.2006.

5. The main objection raised by all the counsel is that the decree operates only against Defendant Nos.1 and 3 and not against the remaining Defendants. This objection was taken on different basis.

6. Firstly it was contended that on a plain reading the decree operates only against Defendant Nos.1 and 3.

7. I am unable to agree. A plain reading of the decree militates against the submission. The other facts establish its falsity.

8. The original decree was signed and pronounced in open Court on 25.6.1999 by the learned Judge. The order passed by the learned Judge records that the learned advocate Mr.Atul Mehta had appeared "for the Defendants". After narrating the facts the original decree states:-"

> "The case (is) came up on 25/6/99 before 3rd Jt.C.J.(S.D.), (Smt.M.D.Bhatt) Saheb, Vadodara in the presence of Ld.Ad.Shri B.N. Parikh for the plaintiff and Ld.Ad.Shri Atul Mehta for the defendants, for final disposal of the case. The said case is disposed off in terms of compromise at Exh.14 are as under :-
>
> **COMPROMISE DEED** "

Then follow the terms of the compromise decree.

The above extract itself makes it clear that the learned advocate appeared for all the "Defendants" and not only for Defendant Nos.1 and 3.

9. The doubt, if any is set at rest by the fact

that the learned advocate signed the compromise deed as "Advocate for the Defendants".

10. Every term of the Compromise Deed refers to the plural "defendants" and not the singular "defendant".

For instance Clause 4 states that :- "the Defendants" had offered and agreed to pay the principle outstanding amount with interest in instalments to the Plaintiff as per the schedule of payments therein. Clause 5 states that "the Defendants" have agreed to pay interest as stipulated therein.

The other clauses also refer to the Defendants in the plural.

11. I appreciate that the mere use of the plural, "Defendants", would not by itself be conclusive of the fact that the compromise deed was entered into by all the Defendants, as admittedly Defendant Nos.1 and 3 were parties to the compromise deed. The plural, "Defendants", would therefore in any event be used. However, the compromise deed read as a whole indicates

beyond any doubt whatever that all the Defendants were parties to it.

12. For instance it has been specified in Clauses 5 and 7 : "the Defendants (M/s.Aminex Rasayan (Defendant No.1) and its partners)".

It is important to note that it is further provided in clauses 5 and 7 as follows :-

> "5. The Defendants (M/s.Aminex Rasayan - Defendant No.1 and its partners - defendants) have agreed and undertaken to deliver the post-dated cheques as agreed by all partners as aforesaid duly signed by Mr.Deepak M. Shah, their authorised partner on their behalf, subject to the jurisdiction of the courts at Vadodara.
>
> .....
>
> In the event the defendants (M/s.Aminex Rasayan and its partners) fail to honour any cheque on its presentation the plaintiff shall be entitled forthwith to take appropriate legal actions against them including actions under the Negotiable Instruments Act, 881 in respect thereof without considering the grace period." (emphasis supplied)
>
> 7. It is hereby agreed by M/s.Aminex Rasayan (Defendant No.1) and its partners (defendants) not to take any step like change of Bank account change of place of business and/or constitution of the firm, which is prejudicial to the interest of the plaintiff and/or may adversely affect the realization of the advance post dated cheques submitted by the

> defendants from time to time and under execution of these settlement terms stated herein. The Defendants have assured to fulfil and honour all their obligations herein to the plaintiff and the plaintiff has on trust and in good faith agreed to these terms." (emphasis supplied)

13. Faced with this, it was contended that there is nothing either on the face of the decree or on record to indicate that the Defendants other than Defendant Nos.1 and 3 had agreed to be bound by the said decree.

14. The submissions are unfounded. I have set out earlier that the learned Judge recorded that the learned Advocate had appeared for the "Defendants" and not merely for Defendant Nos.1 and 3. I have also set out that the learned advocate signed the Consent Terms as "Advocate for the Defendants and not merely for Defendant Nos. 1 to 3. That the advocate had authority to enter into the said term on behalf of the defendants cannot be doubted in view of the judgment of the Supreme Court in *Byram Pestonji Gariwala versus Union Bank of India (1992)1 SCC 31.*

15. When this was pointed out it was contended that there is nothing on record, to indicate that the

Defendants, other than Defendant Nos. 1 and 3, had in fact authorized either Defendant No.3 or the said advocate to enter into the Compromise Decree.

16. None of the Defendants have ever contended that the learned advocate was not appointed on their behalf. None of them have contended that their advocates authority had been curtailed. Moreover there has not been a single application thus far for setting aside the original decree on the ground that the learned advocate had no authority to enter into the compromise deed. Nor is there a single letter to or complaint against the learned Advocate in this regard. I will presume, although I am not convinced that the Defendants other than Defendant Nos.1 and 3 came to learn about the original decree and compromise deed only in August, 2006. It is pertinent to note that even thereafter no such complaints or grievances have been raised.

17. Had the defence been true there would surely have been some protest about the same. If indeed the advocate did not have any such authority, surely some action would have been taken by the Defendants against him or at least for having the compromise deed set aside. They have done no such thing. There is no

reason to presume that the learned Judge wrongly recorded that the learned advocate had appeared for all the Defendants. It is not merely reasonable but necessary to presume that what is recorded by the learned Judge is correct. This is more so when the same is not questioned now for eight and a half years.

18. These facts establish that apart from the implied authority of the learned Advocate to enter into the Compromise Deed on behalf of all the Defendants, they in fact expressly authorised him to do so and were aware throughout of his having agreed to the Compromise Decree on their behalf.

19. I am constrained to note that the objections now taken are less than honest and a clear after-thought. In the circumstances it must be held that all the Defendants were represented by the learned Advocate; that the learned advocate had authority to enter into the Compromise Decree on behalf of all the Defendants and that the learned advocate in fact entered into the Compromise Decree on behalf of all the Defendants; that none of the Defendants curtailed or limited the implied authority of the advocate; that all the Defendants expressly authorized the advocate to agree to the terms and were

throughout aware of all the facts relating thereto and that all the Defendants are bound by the same. I have come to these conclusion not merely as a matter of legal inference but on an appreciation of the facts as well.

20. It is pertinent also to that Defendant No.3, who throughout the hearing supported the other Defendants, signed the consent terms on behalf of the firm and its partners. Defendant No.3 signed the compromise deed : "for AMINEX RASAYAN AND ITS PARTNERS"

21. Relying on Section 19 of the Indian Partnership Act it was contended however that Defendant No.3 was not entitled to admit any liability in the suit against the firm.

22. Firstly in any event this aspect would make no difference as the compromise deed having been signed on behalf of all the Defendants by their advocates, binds them.

23. Further I will presume that Defendant No.3 did not have in law implied authority as a partner to admit any liability in a suit or proceeding against

the firm. However, the facts and circumstances of this case indicate that Defendant No.3 had been authorized to do so in the present case.

24. Defendant No.3 has not filed any affidavit explaining his conduct. Defendant No.3 has not denied the fact that he entered into the compromise deed on behalf of all the parties. There is not a single written communication from the remaining Defendants raising any grievance against Defendant No.3 for allegedly wrongly entering into the compromise deed on their behalf. The absence of any denial by Defendant No.3 when considered along with the fact that the remaining Defendants have never before made any grievance now raised regarding Defendant No.3 having acted on behalf of them indicates that Defendant No.3 acted on behalf of all the defendants pursuant to their having authorized him to do so.

25. I am not inclined to accept the bare submission in the affidavits that Defendant Nos.4, and 6 to 11 had never authorized Defendant No.3 to execute the alleged compromise deed on their behalf. It is further pertinent to note that the affidavits have been filed only by Defendant Nos.4 and 11. Defendant Nos.2 and 6 to 10 have not filed any affidavits. Even

if it is presumed that the affidavits have been filed on their behalf it would make no difference as it is contrary to the record especially the order of the learned Judge and the compromise decree.

26. In that view of the matter, it is not necessary to consider whether the remaining Defendants are liable by virtue of the decree having been passed against Defendant No.1 in any event.

27. In the circumstances, I have come to the conclusion that all the Defendants were parties to the compromise deed and that the original decree passed by the learned Judge operates against all the Defendants.

28. It was then submitted by Mr.Jain that the decree is not executable as the Plaintiffs had failed to perform its obligation under the Compromise Deed. Before dealing with this submission, it is necessary to note that Mr.Shah, the learned counsel appearing on behalf of Defendant Nos.7 to 11 not only distanced himself from the submission but expressly stated that it is not even open to the Defendants to urge this contention as it would be destructive of the Defendants main submission. It is therefore clarified that this defence/objection has been raised only on

behalf of Defendant Nos.2, 3 and 4. The submission is founded on clause 10 of the compromise deed which reads as under :-

> "10. It is hereby agreed by and between the parties that on execution of these terms of settlement of the suit the Criminal Complaints viz.No.1326/97 of Rs.10 lacs, 1399/97 of Rs.9 lacs, 1400/97 of Rs.10 lacs and 1401/97 of Rs.9 lacs aggregating to principal amount of Rs.38 lacs filed by the plaintiff against the defendants shall be pending and put on sine die file shall be maintained and on realisation of fall payment of principal amount of the complaints and interest thereon as per schedule of payment herein the plaintiff shall withdraw the said criminal complaints against the defendants."

29. There is no dispute that an amount of over Rs.38,00,000/- had been paid by 2.6.2003.

It is, however, important to note, as admitted by Mr.Jain, that the amount had not been paid as per the schedule referred to under clauses 4 or 5. In the circumstances, the Plaintiff was not bound to withdraw the said complaints.

30. Mr.Jain, then submitted that under clause 10 there is no schedule prescribed for payment of the amounts in respect of the specific criminal

complaints. In other words according to him, time for payment of the said amounts was not specified qua the complaints.

31. It is pertinent to note however, that if this is so, the Defendants have not even indicated as to how or why the payments made ought to be appropriated towards the said complaints. The point is raised by the Defendants and the onus is upon them to establish the same. I have indeed taken a view most favourable to the Defendants by presuming that the first payments ought to be appropriated towards the amounts payable under the complaints. However, even taking this view the payments were not made as per the schedule.

32. Further the payment under the Compromise Deed is not subject to the withdrawal of the complaints. If the objection is well founded, it can always be taken as a defence at the hearing of the criminal complaint. I see no warrant for setting aside or annulling the execution of the decree of over Rs.6,50,00,000/- for this reason.

33. Further still there is no time limit for the Plaintiff to comply with its alleged obligations under Clause 10. Thus even if the objection is found to be

well founded at this stage, the Plaintiff would have been entitled to an opportunity to comply with Clause 10 even now. As I have come to the conclusion that the Plaintiff is not bound to withdraw the Complaints the question of offering this opportunity to the Plaintiff does not arise.

34. Further in this view of the matter, I have not considered the other submissions raised by Mr.Behram-Kamdin on behalf of the Plaintiffs including on the basis of ratification. In this view of the matter, it is not necessary for me to consider the submissions under Order XXI Rule 50 of the Code of Civil Procedure relied upon on behalf of Defendant Nos.6 to 11 on the basis that they were not partners of Defendant No.1 on the date of the suit.

35. Lastly it was submitted by Mr.Jain that in fact an amount of Rs.65,00,000/- and not merely Rs.56,00,000/- had been paid towards the decree. The dispute is therefore regarding a sum of Rs.9,00,000/- only.

36. That an amount of Rs.65,00,000/- has been paid is not in dispute. The dispute is whether the amounts have been paid to the credit of the above suit

or whether the amounts have been paid in respect of separate transactions. The onus is on the Defendants to establish that the amount of Rs.9,00,000/- in addition to Rs.56,00,000/- has been paid towards the credit of this suit. There is nothing on record to establish the same. In the circumstances, this submission is also rejected.

37. In the circumstances, the Notice under Order XXI Rule 22 of the Code of Civil Procedure is made absolute and it is ordered that the decree be executed. Office is directed to proceed accordingly.

38. The operation of this order is stayed for a period of twelve weeks from today subject to each of the Defendants filing an affidavit in this Court on or before 7.1.2008 specifying all their assets, moveable and immovable. Further in view of this stay, the Defendants are restrained from surrendering, disposing of, alienating, encumbering, parting with possession of or creating any third party right, title and/or interest in, to, upon or in respect of their immovable properties including tenancy or leasehold rights, if any for a period of sixteen weeks from today. Liberty to the Plaintiff to apply after the affidavits are filed.